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October 25, 2016

[Complainant]

*** Superintendent
[District]

THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION

RE: **FINAL REPORT** for In the Matter of **, 2016-07, Alleged Violations of the Individuals with Disabilities Act (IDEA).

This is the Final Report pertaining to the above-referenced state special education complaint (Complaint) filed pursuant to the Administrative Rules of Montana (ARM) 10.16.3662. *** (Complainant) filed the Complaint on behalf of his ***, *** (Student), in *** School District (District). The Complainant alleges that the District violated the IDEA, 20 U.S.C. Section 1400 et seq., Montana special education laws, Title 20, Ch. 7, Montana Code Annotated (MCA), and corresponding regulation at 34 CFR Part 300 and ARM 10.16.3007 et seq.

A. Procedural History

1. On July 19, 2016, the Montana Office of Public Instruction (OPI) received a special education complaint signed by the Complainant.

2. The parties agreed to extend the time period for this state complaint by extending the Early Assistance Program process in order to try and informally resolve the issues in the Complaint pursuant to 34 CFR § 300.152(b)(ii). On August 24, 2016 OPI's Early Assistance Program Director received an email from Complainant's daughter stating that Complainant would like to proceed with the investigation process.

3. OPI sent a Request for Written Response to the District. The OPI received the District's written response to the Complaint on September 23, 2016.

4. An appointed investigator conducted interviews with: the Principal, District Special Education Case Manager for grades 5 - 8, and the Director of the *** Special Education Cooperative. The investigator made multiple attempts to contact the Complainant in order to interview and obtain additional information relevant to the issues raised in the complaint. Unfortunately, the Complainant did not contact the investigator until the investigation was concluded.

B. Legal Framework

The OPI is authorized to address alleged violations of the IDEA and Montana special education laws through this special education state complaint process as outlined in 34 CFR § 300.151-153 and ARM 10.16.3662, which occurred within one year prior to the date of the Complaint. Pursuant to 34 CFR § 300.151-153 and ARM 10.16.3662, all relevant information is reviewed and an independent determination is made as to whether a violation of federal or state statute, regulation, or rule occurred. The District allegedly:

1. Failed to provide prior written notice (PWN) pursuant to the procedural safeguards of the IDEA;
2. Failed to respond to reasonable requests for explanations and interpretations of information in the record;
3. Adopted the Student's October 29, 2015 IEP from Intermountain upon the return of the Student to the District;
4. Failed to educate the Student in the least restrictive environment (LRE); and
5. Failed to follow the IDEA's disciplinary requirements for eligible students.

C. Findings of Fact

1. The Complainant has standing to file this Complaint pursuant to ARM 10.16.3661 and 34 CFR § 300.153.

2. The Complainant is the Student's *** and also his legal guardian.

3. The Student is currently eligible for special education under the IDEA with the classification of Emotional Disturbance.

4. The Student was enrolled in the District during the 2014-2015 school year.

5. After the end of the 2014-2015 school year, the Student was admitted to the residential program at Intermountain on June 17, 2015. The Student's initial treatment plan states that the Student is being admitted for stabilization of aggressive and uncontrollable behaviors within the family, community and education environment, such as verbal aggression, aggression, defiance, opposition, and non-compliance. The treatment plan states that the student's estimated length of stay is 6 months, setting discharge for December 2015.

6. Intermountain is a private facility that provides therapeutic treatment for children in both residential and outpatient settings. The Student was not placed at Intermountain by the District and the District was not involved in the decision to place the student at the facility.

7. OPI contracts with Intermountain to provide educational services to Montana resident students who attend Intermountain.

8. The Student's annual IEP was developed by Intermountain on October 29, 2015. The IEP includes the following relevant information:

- * The statement of the Student's present levels of academic achievement and functional performance (PLAAFPs) on the IEP provides that the student struggles with math, reading, written expression and that classroom behavior has not been an issue.
- * The IEP reflects that the Student's placement is in a residential setting due to his social emotional needs, and that the placement is based on the IEP. The Student's educational day is neither lengthened nor shortened.
- * The Student receives the following accommodations and modifications as part of the IEP:
 - * extra time to complete assignments
 - * use of a calculator when working on higher level assignments
 - * use of a multiplication table during assignments
 - * preferential seating-close to an adult for support
 - * use of an ipad or laptop for written work
 - * use of grammar and spell check for written work
- * Special Education or Related Services:

Special Education or Related Service Area	Education Setting	Total number of minutes per week	Dates of Service
Math	Special Education	180	October 30, 2015 through Oct. 29, 2016
Reading	Special Education	300	October 30, 2015 through Oct. 29, 2016
Written Expression	Special Education	150	Oct. 30, 2015 through Oct. 29, 2016
Social/Emotional Behavior	Special Education	1170	October 30, 2015 through Oct. 29, 2016
Total Special Education	Special Education	1800	October 30, 2015 through Oct. 29, 2016

9. The October 29, 2015 IEP includes the following relevant information:

- a. The IEP team will meet by June 10, 2016 to determine whether the Student needs extended school year services.

- b. The Student is currently enrolled for education with Intermountain and that the Intermountain school is in session all year.
- c. If the Student has been discharged from Intermountain by June 10, 2016, the District will need to convene an IEP team meeting in order to make the ESY determination.
- d. Statement of whether the student exhibits behavior that impedes the learning of self or others is checked YES.
- e. The Complainant did not check the box indicating that the he approves of the IEP.

10. January 25, 2016, the Student returned to the District. As per the District's Response, the District adopted the IEP developed by Intermountain.

11. February 8, 2016, an IEP team meeting was scheduled but the meeting was rescheduled for February 10, 2016 at the request of the Complainant.

12. February 10, 2016, the Complainant did not show up for the IEP meeting. The District visited with the Student's mother who still retains some legal rights but did not consider this to be an IEP meeting.

13. February 29, 2016 a crisis plan was developed by the District for the Student.

14. March 1, 2016, an IEP team meeting was held. The IEP amendment document is dated February 10, 2016, the date that the meeting was earlier scheduled. The Complainant did not attend but the District reports that there was a telephone conversation with the Complainant prior to the meeting. The Complainant signed the IEP and dated the signature March 1, 2016. The amendments also change the statement of whether the Student exhibits behavior that impedes the learning of self or others to NO.

*Special Education or Related Services:

Special Education or Related Service Area	Education Setting	Total number of minutes per week	Dates of Service
Math	Special Education	250.0	February 11, 2016 through Oct. 29, 2016
Reading	Special Education	300.0	Oct. 30, 2015 through Oct. 29, 2016
Written Expression	Special Education	150.0	Oct. 30, 2015 through Oct. 29, 2016

Special Education or Related Service Area	Education Setting	Total number of minutes per week	Dates of Service
Social/Emotional Behavior	Regular Education	400.0	February 11, 2016 through Oct. 29, 2016
Social/Emotional Behavior	Special Education	725.0	February 11, 2016 through Oct. 29, 2016
Total		1825.0	

15. April 1, 2016, the Student's IEP team convened and amended the IEP to shorten the length of the Student's school day by two hours. This was done by reducing the social/emotional/behavioral minutes provided in the special education setting from 725 to 125 minutes per week.

*Special Factors for the statement of whether the Student exhibits behavior that impedes the learning of self or others is marked NO.

*The Complainant checked the box indicating that he approves the IEP and signed and dated the IEP on April 1, 2016.

16. The OPI received via fax two informal letters from Complainant on May 16, 2016 and June 28, 2016. Neither of these letters were provided to the District. The OPI, with Complainant's consent, emailed the first letter to the Special Education Cooperative Director on May 31, 2016. The District set up a meeting on June 9, 2016 (the day after school got out) to discuss the letter with the Complainant because the concerns had not been previously brought to the District's attention. The meeting was cancelled by the Complainant and his advocate because the school did not have a copy of the student's IEP and therefore were unprepared to discuss the issues. The District proceeded to schedule an IEP team meeting but had to wait until the staff returned to school on August 18, 2016.

17. August 18, 2016, an IEP team meeting was held. Proposed amendments to the IEP were provided by the District. The proposed amendments included the need for a reevaluation and extending Student's day school day back to full days. Complainant has not yet signed consent to the proposed IEP. So far, the Student has only attended the first three days of the 2016-2017 school year.

Analysis and Conclusions

Issue 1 - Failure to provide PWN pursuant to the Procedural Safeguards of the IDEA.

The procedural safeguards of the IDEA require that parents of an eligible student be provided with PWN within a reasonable time before the local education agency (LEA) (here, the District) proposes or refuses to initiate or change the identification, evaluation, or educational placement of the student or the provision of a free and appropriate public education (FAPE) to the student. Pursuant to 34 CFR § 300.503, the notice required must include:

1. a description of the action proposed or refused by the LEA;
2. an explanation of why the LEA proposes or refuses to take the action;

3. a description of each evaluation procedure, assessment, record, or report the LEA used as a basis for the proposed or refused action;
4. a statement that the parents of a student with a disability have protection under the procedural safeguards of Part B of the IDEA and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards may be obtained.
5. sources for parents to contact to obtain assistance in understanding the provisions of Part B of the IDEA;
6. a description of other options that the IEP team considered and the reasons why those options were rejected; and
7. a description of other factors that are relevant to the LEA's proposal or refusal.

PWN must be provided a reasonable amount of time before the District proposes or refuses to initiate or change the identification, evaluation, or educational placement of the Student or the provision of a FAPE to the Student. Providing parents with verbal notice as a substitute for written notice does not fulfill the requirements of the IDEA regardless of whether the verbal notice is substantively proper. *Pikes Peak Bd. of Coop. Educ. Servs.*, 9 ECLPR 15 (SEA CO 2011); and *Union Sch. Dist. v. Smith*, 20 IDELR 987 (9th Cir. 1994), *cert. denied*, 109 LRP 36508 , 513 U.S. 965 (1994).

In this case, the Complainant alleges that the District failed to provide PWN but does not state specifically when he believes PWN was required. The investigator tried to contact the Complainant several times during the course of the investigation but never received additional information from him. The Complaint alleges concerns with the Student being sent home early.

Within the first two months of returning to the District, the Student struggled and social/emotional/behavioral difficulties began to escalate dramatically. The District provided data showing that, irrespective of accommodations, modifications and positive behavioral supports, with the exception of P.E., the Student was unable to stay in class for an entire class period and was melting down before the end of the day. The District stated that, on or around March 30, 2016, the Comprehensive School and Community Treatment (CSCT) program, for mental health support in school, convened a meeting with the Complainant to discuss the Student's escalating behavior. The District states that one of the options discussed was shortening the Student's school day. Notice of this proposal to reduce the Student's school day, including other options discussed and rejected as well as other factors relevant to the proposal or options refused should have been provided to the Complainant *in writing* either before the March 30, 2016 meeting or after but certainly prior to the actual change taking effect. However, no PWN of the proposed change or other options considered and rejected was provided to the Complainant.

On April 1, 2016, another IEP team meeting was convened in order to amend the Student's IEP to reflect the shortened school day by two hours with a dismissal time of 1:00 p.m. daily. The District reports that, shortly before the meeting, the Complainant contacted the Principal to let him know that he would not be able to attend the meeting. According to the District, in spite of the Principal's offer to reschedule, the Complainant insisted that the meeting go forward and that he would come to the school later in the day to sign the IEP amendment. In fact, the Complainant did check the box indicating approval of the amendments to the IEP, signed and dated the document April 1, 2016.

During the course of the investigation the investigator requested documentation of any and all documentation of prior written notice during the time of the Complaint. In response, the District submitted the Student's previous two IEPs developed in October 2014 and 2015 respectively as well

as the two amendments to the IEP as evidence of PWN. These documents are the IEP documents in effect for the Student during the time applicable to the Complaint. While these IEP and amendment documents do provide a description of the action proposed by the District and could be construed to provide most of the other elements, they do not provide a description of other options considered and why those options were rejected. This element is required by the procedural safeguards of the IDEA and is relevant to the basic nature of this complaint.

There is no documentation, in the IEP amendment, of other options besides a shortened day being considered and the reasons for accepting or refusing these options and when interviewed during the course of this investigation, the District representative stated that there were no other options considered because the Complainant approved and encouraged the shortened school day. Therefore, **the District failed to provide adequate PWN with each of the required elements before, during or following the IEP meeting on April 1, 2016 during which the Student's school day was shortened and violated 34 CFR § 300.503.**

The following corrective action is in order:

The District's special education professionals, District's administrators, and co-op special education professionals will receive training on drafting adequate PWN, whether provided as part of the IEP or on a separate form, including all of the required elements. The OPI must pre-approve the provider of the training and evidence of this training will be provided to the OPI no later than November 30, 2016.

Issue 2 - Failure to respond to reasonable requests for explanations and interpretations of information in the record.

The procedural safeguards of Part B of the IDEA provide parents with an opportunity to inspect and review all education records of the student with respect to the identification, evaluation, and educational placement of the student and the provision of a FAPE to the student. 34 CFR § 300.501(a); see also 34 CFR § 300.613-300.621.

There is no evidence of a request to inspect or review educational records for the Student. The investigator made multiple attempts to provide the Complainant with an opportunity to provide additional information relative to the complaint investigation. Unfortunately, three times, the Complainant replied that he would call to talk but never did. Therefore, considering the evidence available, the investigator finds that there is no failure to respond on the part of the District. Furthermore, there is no evidence that the District has failed to respond to any request for explanation or interpretation of information in the record.

No corrective action is in order.

Issue 3: The District's adoption of the Student's October 29, 2015 IEP from Intermountain upon the return of the Student to the District.

The IDEA requirement for intrastate transfers is set out in 34 CFR § 300.323(e):

IEPs for children who transfer public agencies in the same State. If a child with a disability (who had an IEP that was in effect in a previous public agency in the same

State) transfers to a new public agency in the same State, and enrolls in a new school within the same school year, the new public agency (in consultation with the parents) must provide FAPE to the child (including services comparable to those described in the child's IEP from the previous public agency), until the new public agency either— (1) Adopts the child's IEP from the previous public agency; or (2) Develops, adopts, and implements a new IEP that meets the applicable requirements in §§ 300.320 through 300.324.

Intermountain is a private facility that provides both residential and outpatient therapeutic health services for youth in need. After the close of the 2014-2015 school year, the Student was unilaterally placed, by Complainant, in the Intermountain treatment center. There is no indication that this placement was made for educational purposes and the District was not involved in the placement in any way. Once the Student was placed in Intermountain, Intermountain began providing educational services including special education services to Student. Pursuant to MCA § 20-7-435(2) the OPI contracts with Intermountain to provide educational services to children including regular and special education services. When a student is a resident of Montana and attends Intermountain, Intermountain becomes responsible for providing a FAPE to that student.

Student's annual review of his IEP was due during the time period the Student was at Intermountain. Therefore, as required, the IEP team at Intermountain met and held the annual review of the Student's IEP on October 29, 2015. The Complainant signed as a participant of the IEP team meeting on October 29, 2015 but **did not sign his consent approving of the IEP**. As documented on the Student's Transfer Student Documentation form, upon return of the Student to the District, the District received the October 29, 2015 IEP from Intermountain on January 27, 2016 and proceeded to implement services comparable to those in the October 29, 2015 IEP, albeit with some differences in service delivery and placement in a less restrictive environment since the Student was living at home and no longer in a residential program. The Student's placement was similar to the Student's placement when he was previously enrolled in the District without a shortened school day. An IEP team meeting was scheduled for February 8, 2016 but rescheduled for February 10, 2016 at the request of the Complainant. The Complainant did not attend the February 10, 2016 meeting but the Student's mother did attend. Because the mother still retains some parental rights, the meeting was held as scheduled. In order to meet with the Complainant and finalize amendments to the IEP, the District scheduled another meeting for March 1, 2016. Again, the Complainant was unable to attend the meeting. However, according to the District, the Complainant spoke with school staff to discuss the amendments to the Student's current IEP. Although not present at the meeting, the Complainant did check the box indicating approval of the amendments and signed the IEP amendment document with the date March 1, 2016. The District perceived that, based on conversations with the Complainant and approval of the IEP amendments, the Complainant was in full support of these amendments to the IEP.

The District implemented services comparable to those described on the IEP developed at Intermountain pursuant to 34 CFR § 300.323(e). The District then proceeded to schedule IEP meetings to amend the IEP for Student. Procedurally, the Complainant never consented to the October 15, 2015 IEP so the District should have developed a new IEP because the Student did not have a current IEP to amend. However, the District did obtain the Complainant's consent to the modifications made to the October 29, 2015 IEP so there was no material or substantive harm to the Student by this procedural error.

No corrective action is in order.

Issue 4 - Failure to educate the Student in the least restrictive environment (LRE).

According to the IDEA, to the maximum extent appropriate, students with disabilities, including students in public or private institutions or in other care facilities, are educated with students who are nondisabled and special classes, separate schooling, or other removal of students with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 CFR § 300.114.

Following development of the student's annual IEP, the team determines the LRE where the IEP will be implemented. This determination results in the student's educational placement. Here, the Complainant alleges that the District has failed to educate the Student in the LRE. The IDEA provides that each LEA must ensure that a continuum of alternative placements is available to meet the needs of students with disabilities for special education and related services. The lens of the LRE requires the District to look first at the regular classroom of the school closest to the student's home. The student should be placed in a more restrictive setting only if education with accommodations and modifications is unable to be achieved. During the time relevant to this Complaint, when enrolled in the District, this Student has been educated in the school he would attend regardless of disability and receives educational service in both the regular education and special education resource setting.

As discussed in Issue 3 above, from the beginning of the school year to the end of January, the Student did not attend school in the District. During the time the Student was not attending school in the District, he was placed at Intermountain, a private residential therapeutic program, and the Student attended school there. When the Student's annual IEP was due for review and revision (October 29, 2015), Intermountain drafted a new IEP for the Student in residence. When the Student returned to the District in late January 2016, the school provided comparable services to those in the annual IEP written by Intermountain albeit placing the Student in the school closest to home with age appropriate nondisabled peers. This is the same placement that the District had for the Student when he was enrolled with the District during the 2014-2015 school year.

An IEP team meeting was scheduled for February 8, 2016 and rescheduled for February 10, 2016 at the Complainant's request. A draft to amend the adopted IEP was prepared to reflect some changes in services and placement in a less restrictive environment since the Student was now living at home rather than in the therapeutic residential setting. Because the Complainant did not show up for the meeting, another meeting was scheduled for March 1, 2016. Although the Complainant, again, did not attend the meeting, he did document approval of the amendments reflecting changes in services and placement in the school's intensive resource program and regular education program, signed and dated the IEP amendments on March 1, 2016. There is no indication that the Complainant did not support the changes at that time.

Again, on April 1, 2016 the IEP team met, again without the Complainant in attendance, to shorten the Student's school day after the team determined that the Student had more difficulty with social/emotional/behavioral areas as the day progressed. Again, the Complainant signed and dated approval of the amendments on April 1, 2016, the same day that the meeting took place.

Undeniably, both of these options are much less restrictive than Intermountain's residential program. As part of this investigation, the District indicated that the Student was more successful in class and had fewer melt downs after the day was shortened. Although there was no plan for reintegrating the Student to a full school day, there were only two months left of school when the Student's day was shortened.¹ A proposed IEP, dated August 18, 2016, that has never been approved returned the Student to a full school day. The Student only attended the first three days of the 2016-2017 school year and has been absent since.

Montana requires written acknowledgement of parental acceptance of each IEP. Although the record reflects that the Complainant did not actually attend the meetings amending the IEP, the Complainant signed, dated and documented his acceptance of each of these amendments. Based on the above information, the District did not fail to educate the Student in the LRE.

No corrective action is in order.

Issue 5 - Failure to follow the IDEA's disciplinary requirements for eligible students.

The IDEA has very prescriptive disciplinary procedures that apply to eligible students. These procedures apply when school personnel take disciplinary action that removes an eligible student from his or her current educational setting. 34 CFR § 300.530.

Because the Complainant has not provided any additional information to support this allegation, the investigator concludes that the Complainant misunderstands and misapplies the procedures applicable to disciplinary action. On April 1, 2016, the Complainant agreed to shorten the Student's school day by two hours resulting in the Student ending his school day at 1:00 p.m. each day. There is no information available indicating that the Student was removed as a result of disciplinary action. Rather, according to the amendment to the IEP, approved by the Complainant, the shortened day was intended to help the Student be successful because the Student becomes overwhelmed as the day progresses and ultimately melts down. The Complainant was invited to provide the investigator with additional information during the course of the investigation but never did so. Therefore, the IEP amendments signed, dated, and approved by the Complainant lead to the finding that the disciplinary procedures of the IDEA were not at issue.

No corrective action is in order.

Note on Extended School Year Services

A student's IEP team is to decide on an individual basis if a student is eligible for extended school year (ESY) services. ESY services are only provided if necessary for the provision of FAPE to the Student. IEP teams are required to use recoupment and regression as the criteria for determining eligibility for ESY services. See ARM 10.16.3324. The March 1, 2016 and April 1, 2016 amendments to Student's IEP indicated the IEP team needed to convene a meeting in May 2016 to determine whether the Student required ESY services and this did not happen.

Therefore, the District is in violation of ARM 10.16.3324 and the following corrective action is in order:

¹ If the IEP team shortens a Student's school day, the OPI recommends the District put together a plan for how the Student's time will be increased in working back towards full days. Stating in the IEP that the team will meet to discuss length of day as necessary is not sufficient.

The District will convene an IEP meeting by November 30, 2016 to discuss whether ESY services were necessary for Student during the summer of 2016 under the requirements of ARM 10.16.3324 in order for Student to have received FAPE. If the IEP team determines the Student should have received ESY services, the District shall offer Complainant compensatory educational services in order to make up for not providing ESY services. The plan must be reviewed and approved by OPI prior to implementation. If the IEP team determines ESY was not necessary no further action is required.

Frank Podobnik, OPI Special Education Director

c: Mandi Gibbs, OPI Dispute Resolution/EAP Director
Dale Kimmet, OPI School Improvement/Compliance Unit Manger
[District's attorney]